Telescope Casual Furniture, Inc. *and* International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, Local 36 FW. Cases 3–CA–18903 and 3–CA–19180

August 27, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN AND HURTGEN

On August 11, 1995, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel and the Charging party filed exceptions and supporting briefs, the Respondent filed a brief in opposition to exceptions, an opposition to the Charging Party's request for oral argument, and the Charging Party filed a brief in reply to the Respondent's opposition to exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings, and conclusions, as modified below, and to adopt the recommended Order.

The judge found, inter alia, that the Respondent did not violate Section 8(a)(5) and (1) by implementing its alternative bargaining position on October 18, 1994,[2] following the Union's rejection of the Respondent's final contract offer on September 16. The judge relied on the Board's holding in *Taft Broadcasting Co.*, 163 NLRB 474 at 478 (1967), enfd. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). *Taft* holds that, after bargaining to an impasse, an employer may lawfully implement proposals reasonably comprehended within those it offered before impasse. That case holds that, after bargaining to an impasse, an employer may lawfully implement the proposals that were the subject of the impasse. The judge also distinguished the case of *Toyota of San Francisco*, 280 NLRB 784 (1986). In his view of the instant case, all the provisions contained in the alternative position had been fully discussed and understood by the parties. In addition, the judge noted that the judge in *Toyota* had referred to the employer's "ultimatum" offers as "not-fully-understood, or even discussed."

The General Counsel and the Charging Party filed exceptions to the judge's findings, and contend that the facts in *Toyota of San Francisco*[3] are similar to those here, that the Respondent's final offer here was accompanied by a threat to implement an alternative position containing more onerous terms if its final offer were rejected; and that the Respondent unlawfully implemented its alternative position on October 18 without discussing its terms during the negotiations.

The relevant facts, as more fully set forth in the judge's decision, are as follows. The Respondent and the Union met on July 21 to commence negotiations for a new agreement to replace the 3-year agreement which was set to expire on September 15. At the next (second) negotiation meeting on August 2, the Respondent announced that there would be two offers, a final offer and an alternative proposal. The Union asked the Respondent not to make an alternative proposal. The Respondent announced, at the September 14 bargaining session (ninth session), that if the Union did not agree to its final offer, the Respondent would implement its alternative proposal.

On September 15, the Respondent gave the Union a copy of a letter, dated September 14, that the Respondent had sent to its employees. The letter indicated that the Respondent's final offer would be available only until midnight, September 16. The letter also noted that, if the Respondent had to operate the plant without a contract, the wages and other terms and conditions of employment that it would put into effect (the alternative proposal) would not be as favorable as the package that constituted the final offer. "If Telescope has to operate the plant without a contract, the wages and other terms and conditions of employment will not be as favorable as the compromise package the company is willing to put in a final offer."

That night, after the parties' final bargaining session, the Respondent gave the Union a cardboard box containing 160 copies of the Respondent's alternative proposal, which did indeed contain less favorable terms, and at the same time presented to the Union its final offer which was to be effective until midnight on September 16. The Respondent indicated that if the final offer was not accepted by the end of September 16 it would be withdrawn, and that the Respondent's alternative position would become its final position and would be implemented.

A union membership meeting was held on September 16. Copies of the Respondent's final offer and alternative offer were available to the membership. The membership rejected the final offer. The Union's bargaining committee recommended that no action was required by the membership on the Respondent's alternative proposal because it was worse than the final offer. Picketing and a strike commenced on that day and lasted until February 16, 1995.

The parties met again on September 23. The Respondent offered two changes to its alternative proposal: increases in the cost-of-living allowance and compensation for replacement health insurance costs for retirees living

[1] The Charging Party has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] All dates are 1994 unless otherwise indicated.

[3] We note that there were no exceptions in *Toyota* to the judge's finding that the employer's implementation there was unlawful. Thus, we do not consider that case as precedent. Nevertheless, we agree with the judge that this case is distinguishable from *Toyota.*

out of the area. The Respondent also indicated its willingness to put the final offer back on the table.

On September 26, the parties agreed that they were at impasse over the Respondent's final offer, whereupon the Respondent said the alternative proposal was the offer on the table. The Union did not seek discussion of the terms of the alternative proposal.

In a letter to the Union dated October 3, the Respondent indicated its intent to implement part of its alternative proposal, and said that it intended to begin using replacements as of October 17. The terms to be implemented included a $3.25-per-hour, cost-of-living allowance; new medical, life, and disability insurance coverage; and new overtime and seniority provisions. These terms were not in the final proposal. However, they were in the alternative proposal. In a letter to its employees dated October 5, the Respondent noted that no further bargaining meetings had been scheduled; that it did not really want to hire replacements; and that it was offering the employees a chance to return to work under the conditions set forth in its October 3 letter to the Union, described above, all of which were contained in the alternative proposal and outlined in the Respondent's prior statement to employees of September 15. The Respondent stated that if the employees did not return to work by October 17, it would begin to hire replacements.

At a union meeting on October 9, the employees expressed displeasure at the Respondent's October 5 letter and stated that they were unwilling to accept anything that took away their seniority, as did the alternative proposal. The membership voted not to return to work under the alternative proposal. On October 18, the Respondent resumed production with replacement workers and some returning employees. The terms were those in the alternative proposal.

On these facts, the judge found that the Respondent's implementation of the Respondent's alternative proposal was lawful. He found that the provisions contained in the alternative proposal, although harsher than the terms of the Respondent's final proposal, had all been proposed or discussed during the negotiations and were "reasonably comprehended," as provided in *Taft Broadcasting*,[4] by Respondent's earlier proposals.

In affirming the judge's conclusion that the Respondent did not violate Section 8(a)(5) and (1), we note that regressive bargaining is not per se unlawful. See, e.g., *McAllister Bros.,* 312 NLRB 1121 (1993). In our view, regressive bargaining is unlawful if it is for the purpose of frustrating the possibility of agreement. In the instant case, however, the Respondent used its alternative proposal to press the Union to come to an agreement. In this connection, we note that, as the judge pointed out, there is no allegation of bad-faith bargaining on the part of the Respondent.

In sum, Respondent's alternative proposal was used to pressure the Union to agree to the primary proposal. It is not unlawful for an employer to use economic pressure (e.g., a lockout) to foster agreement on the employer's terms.[5] In addition, Respondent made its alternative proposal available to the Union and offered to bargain about its contents. The Union declined the opportunity to do so. However, contrary to Member Liebman's dissent, we do not conclude that the Respondent's alternative proposal was merely an ultimatum or club to force the Union to accept the final offer. Rather, we find that the alternative was a bona fide proposal in its own right, as evidenced by the fact that not only did the Respondent offer to bargain over it but, further, at the September 23 session, the Respondent offered to modify its terms in several respects in order to make it more acceptable to the Union. In these circumstances, we conclude that it was not unlawful for the Respondent to implement the alternative proposal after the Union rejected the prior, "final" proposal.[6]

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

CHAIRMAN GOULD, concurring.

I write separately, as I did in *White Cap,* 325 NLRB 1166 (1998), to reiterate that tough and sometimes distasteful tactics engaged in by employers and unions throughout the collective-bargaining process are frequently not unlawful under the National Labor Relations Act. Just as unions may bargain for enhanced wages, benefits, and job security, employers may also seek concessions or take a regressive stance with regard to hours and working conditions in the employment relationship. Indeed, the previous decade and much of the 1990s have witnessed "give backs" and "concession bargaining" on a wide variety of fronts and industries. The statute does not address the content of bargaining proposals or the shape of the bargaining stance of labor and management and, indeed, Section 8(d) of the Act admonishes the Board to eschew interference and regulation of such. In *White Cap*, I discussed these principles in relation to an employer's use of so-called "regressive bargaining" to pressure a union to accept its final offer. Here, I discuss whether an employer can wield an alternative bargaining position to exert similar pressure on a union.

In the case of the refusal to bargain arena as it relates to both employers and unions under Section 8(a)(5) and 8(b)(3), the limitation upon bargaining postures undertaken in the negotiation process is the prohibition upon a bad-faith intent not to consummate a collective-bargaining agreement. Cf. *NLRB v. Insurance Agents*

[4] Supra.

[5] *American Ship Building v. NLRB*, 380 U.S. 300 (1965).

[6] In view of our conclusion, we do not reach the issue of whether the implementation of the alternative proposal caused or prolonged the strike.

(Prudential Insurance Co.), 361 U.S. 477 (1960). Under the analogous area of bargaining tactics in a case arising under Section 8(a)(1) and 8(a)(3), the Court has held that the lockout is permissible as a bargaining tactic in established relationships unless it is used "as a means to injure a labor organization or to evade [the] duty to bargain collectively." *American Ship Building v. NLRB*, 380 U.S. 300 at 308 (1965).

Here, of course, the Employer is using an alternative bargaining proposal as a bargaining tactic to obtain acceptance of its last offer—an offer which may be distasteful to the Union and the employees which it represents and, as the litigation which brings this case before the Board attests, a tactic which is profoundly objectionable. But as the Court said in *American Ship Building* the mere fact that "the employees suffered economic disadvantage because of their union's insistence on demands unacceptable to the employer" is irrelevant to the statute's regulatory sweep. Id. at 312–313.

American Ship Building, of course, was concerned with the lawfulness of the lockout and subsequent decisions by the Board and the Court of Appeals for the District of Columbia have held that lesser forms of economic pressure, i.e., temporary changes in conditions of employment which involve reduction of benefits are unlawful. See *United States Pipe & Foundry Co.*, 180 NLRB 325 (1969) (Member Zagoria, dissenting at 325 and 326) enfd. sub. nom. *of Molders Local 155 v. NLRB*, 442 F.2d 742 (D.C. Cir. 1971). Compare, *NLRB v. Great Falls Employers Council*, 277 F.2d 772 (D.C. Cir. 1960), holding lawful employer lockout tactics designed to disqualify workers for unemployment compensation benefits.

But in *United States Pipe & Foundry* the Board and the court dealt with conduct which was designed to induce a strike. Indeed, through its unlawful unilateral changes, the employer impermissibly removed the subject matter from the bargaining table. See *NLRB v. Katz*, 369 U.S. 736 (1962). No similar facts are presented here, notwithstanding the existence of a strike and its relationship to the unfair labor practice issue. Moreover, what is involved in the instant case is the question of whether full scope for good-faith bargaining within the meaning of the Act was provided ample accommodation, given the bargaining tactics of the employer.

The key to resolution of the issue present here is whether the conditions of employment implemented by the employer are completely comprehended by its final proposal. See *NLRB v. Crompton-Highland Mills*, 337 U.S. 217 (1949); *Auto Workers Local 159 v. NLRB*, 776 F.2d 23 (2d Cir. 1985); *Lapham-Hickey Steel Corp. v. NLRB*, 904 F.2d 1180 (7th Cir. 1990). For as the Court said in *Insurance Agents* "collective bargaining is a brute contest of economic power somewhat masked by polite manners and voluminous statistics." 361 U.S. at 489;

> . . . the availability of economic pressure devices to each [labor and management] to make the other party inclined to agree on one's terms [are part of national labor relations policy] . . . the use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining. [Id.]

Of course, the employer must, in any alternative proposal, set forth an offer which contains conditions susceptible to negotiation and provide a period of time in which negotiations can take place, i.e., prior to its unilateral implementation of conditions of employment subsequent to impasse. With regard to either the final proposal which has been put on the table or the alternative proposal to be implemented in the event that the final proposal has not been accepted, all that is required is that there be an opportunity for bargaining in good faith between both labor and management prior to impasse—the French word for "no exit"—and the unilateral implementation of such conditions of employment. *NLRB v. Tomco Communications, Inc.*, 567 F.2d 871 (9th Cir. 1978). Cf. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. 395 F.2d 622 (D.C. Cir. 1968).

Here, the alternative terms were announced well before implementation of them. There is no question but that the parties had an adequate opportunity to bargain over *either* of the two offers, final or alternative. Of course, an employer's failure to provide an opportunity for negotiations over the alternative terms offered, a different issue which is not presented here, might suggest unlawful conduct. Compare, *Grondorf, Field, Black & Co.*, 318 NLRB 996 (1995), enfd. in relevant part 107 F.3d 882 (D.C. Cir. 1997), where the employer simply announced its intent to implement an alternative without offering the alternative to the union. If there was no opportunity to bargain or if the content of the employer's offer was vacuous, murky, or confused, a violation could be made out. But those facts are not present in the instant case.[1]

It may be said that the Employer did not seriously entertain the prospect of genuine collective bargaining over the alternative proposal because of its content as viewed from the Union's perspective. But as a general matter[2]

[1] Indeed here, following the Union's rejection of the final offer, the Respondent noted that "they were at their alternative position." Nonetheless, the Respondent offered two modifications to the alternative proposal: an increase in the cost of living adjustment and a payment to retirees of a cash equivalent for health insurance coverage. If anything, this change demonstrates a potential for flexibility that could have been realized at the bargaining table if the union had been willing to take the employer up on its offer to discuss the alternative offer. Cf. *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404 (1982).

[2] "[I]n some instances . . . specific proposals might become relevant to determining whether a party has bargained in bad faith relying on the Board's cumulative institutional experience in administering the Act, we shall continue to examine proposals when appropriate and consider

neither the content of the alternative or final offer can affect the Board's judgment about what constitutes good-faith bargaining. The fact that one side will not seriously consider the offer of the other has no statutory import.[3]

Member Liebman, in reaching a legal conclusion different from mine and the majority relies upon the Court's statement in *Insurance Agents* that the "'unique character' of particular tactics [may] be inconsistent with collective bargaining."[4] Her opinion references the recent court of appeals' decision in *McClatchy Newspapers* and the court's comment in that case that "the Board has wide latitude to monitor the bargaining process."[5]

But *McClatchy* itself provides good support for my views. The heart of the Board's decision in *McClatchy* was a condemnation of the "exclusion of the Guild at the point of its implementation of the merit pay plan from any meaningful bargaining as to the procedures and criteria governing the merit pay plan, when the Guild has not agreed to relinquish its statutory role." *McClatchy Newspaper,* 321 NLRB 1386, 1391 (1996). This critical aspect of the Board's rationale was emphasized by the court of appeals when it said: "Rather than merely pressuring the union, implementation might well irreparably undermine its ability to bargain." Id. at 1032.

The Supreme Court and the Board line of authority relating to unilateral changes illuminate what is at issue in bargaining tactics and duty to bargain cases generally.[6] The per se condemnation of unilateral changes in *Crompton-Highland Mills, Katz,* and *McClatchy* have their origin in the view that such changes preclude bargaining altogether. This is why, though such changes may constitute tactics,[7] they are fundamentally different from weaponry and pressure in the bargaining process itself. This is the fundamental demarcation line between the unilateral change decisions to which Member Liebman alludes and the so-called "freedom of contract" trilogy which governs this case.[8]

As the administrative law judge noted, the Respondent's use of the alternative proposal was "a bargaining tactic designed as an inducement to the Union to accept the more favorable final proposal." Indeed, the judge correctly characterized it as "hard ball bargaining," but the alternative proposal was a tactic the Respondent had used in its negotiations with the Union in 1985, 1988, and 1991, each of which culminated in a contract without a strike. This pattern of bargaining amply demonstrates "positive evidence of the employer's good faith" as defined by the Act. *NLRB v. Brown Food Store*, 380 U.S. 278, 290 (1965). As I stated in *White Cap*, "[a]pplying pressure to the [u]nion by such tactics may seem, to those uninitiated to the world of 'hard ball bargaining,' overwhelming evidence of a bad faith intent . . . . [But] . . . [t]he applicable standard here must be only whether the [r]espondent's tactics provided full scope for good faith bargaining." 325 NLRB 1166 at 1172.

Member Liebman states that, in her view, the fact that the Respondent may have made similar alternative proposals in the past has no bearing on the conduct that is at issue in the case because the alternative proposals were not implemented. While it is true that ultimately the alleged violation here is directed at the implementation of the proposal, the real question is whether the tactics used by the Respondent are indicative of bad faith. The resolution of that issue turns on whether it was proper to use the threat of the alternative proposal as well as its ultimate implementation. Cf. *NLRB v. General Electric Co.*, 150 NLRB 192 (1964), enfd. 418 F.2d 736 (2d Cir. 1969), cert. denied 397 U.S. 965 (1970).

Contrary to Member Liebman's contention, the parties' pattern in collective bargaining is relevant to a determination of good faith. As the Supreme Court has recognized, although it is not determinative, it is appro-

whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective bargaining contract." *Reichold Chemicals, Inc.*, 288 NLRB 69 (1988), enf. granted and modified 906 F.2d 719 (D.C. Cir. 1990); *Litton Microwave Cooking Products*, 300 NLRB 324 (1990); *Concrete Pipe & Products Corp.*, 305 NLRB 152 (1991), enf. granted sub. nom. *Steelworkers Local 14534 v. NLRB*, 983 F.2d 240 (D.C. Cir. 1993); *Hydrotherm*, 302 NLRB 990 (1991); *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992); *Bethea Baptist Home*, 310 NLRB 156 (1993).

[3] See Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401 (1958); Gross, Cullen & Hanslowe, *Good Faith in Labor Negotiations: Tests and Remedies*, 53 Cornell L. Rev. 1009 (1968).

[4] *NLRB v. Insurance Agents*, 361 U.S. 477, 488, 489 (1960).

[5] 131 F.3d 1031 (D.C. Cir. 1997).

[6] As the Board noted in *Daily News of Los Angeles*, 315 NLRB 1236 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1995), in *Katz*, the Court was careful to note that the availability of economic weaponry under *Insurance Agents* is subject to a crucial qualification, namely that the party utilizing it must at the same time be engaged in lawful bargaining. Thus, the Court emphasized that the union in *Insurance Agents*, unlike the employer in *Katz* "had not in any way foreclosed discussion of any issue, by unilateral actions or otherwise." 369 U.S. at 747. Accord: *Central Management Co.*, 314 NLRB 763 (1994), and, prior to the Court's decision in *Katz, Crestline Co.*, 133 NLRB 256 (1961).

[7] In *Crestline Co.*, 133 NLRB 256, 258 (1961), the Board noted the possibility that the employer would use unilateral changes to pressure the union. But, as the Board noted even prior to *Katz*, the National Labor Relations Act, as interpreted, declares that reality, where it exists, to be irrelevant—even though the unilateral change might induce union militancy or produce a better result for the union. Compare, *Midwest Piping & Supply Co.*, 63 NLRB 1060 (1945), obliging employer not to bargain with incumbent unions in the teeth of a representation petition—a holding predicated upon a similar disparagement theory, the vulnerability of which has been at least partially recognized in *RCA Del Caribe, Inc.*, 262 NLRB 963 (1982). Aside from any difference in the respective theories, the duty to bargain law relevant to the textual discussion has been definitively resolved by the Court in *Katz*.

[8] The trilogy is *NLRB v. Insurance Agents*, supra, *American Ship Building v. NLRB*,. supra, and *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952). The tension between cases in which a per se violation is found and those which promote autonomy in the bargaining process is discussed in W. Gould, *A Primer on American Labor Law* 103–118 (3d. ed. 1993); R. Gorman, *Basic Text of Labor Law: Unionization and Collective Bargaining* 481–495 (1976).

priate to look to "industrial practice."[9] Of course, a tension exists between this case authority, infra, and those cases, which in their promotion of the parties' own autonomous procedures, are predicated upon the spontaneity in each collective-bargaining process. Here, however, the industrial practices to which the Board must look for guidance have been supplied by the parties themselves and not *other* unions and employers throughout the United States.

Again, other industrial practices are relevant to a determination of good faith. In this particular bargaining relationship, the practices of these parties have been compatible with good faith in the past and, for the reasons noted in this opinion and the majority's opinion, these practices remain compatible.

Quite obviously, the tactics and stance of the employer were distasteful and unacceptable to the union. I do not like the employer's tactics in this case and, like Member Liebman, I do not find them to be conducive to good industrial relations.[10] Indeed, my personal view is that impasse—a concept inherently vague and thus conducive to perilous litigation for both sides—and unilateral implementation weight the scales against the labor movement improperly in a democratic pluralistic society such as ours.[11] But, we are obliged to subordinate our personal views to the rule of law.

This is why the statutory tests for what constitutes good-faith bargaining under the National Labor Relations Act cannot be based on what is distasteful, unacceptable, or, as Member Liebman's dissent puts it, a "constructive approach" which eschews ultimata or threats. As I noted in *White Cap,* "collective bargaining is wide open and rough and tumble where both parties use their resources and economic strength as best they can." 325 NLRB 1166 at 1172. Unless the tactics are designed to or do affect the existence of the union and the collective-bargaining process and the ability of the union to function effectively,[12] the Board's role is to leave the parties to their devices. Since such evidence is not in the record in the instant case—indeed the record establishes that in the past the precise alternative offer procedure *has* been consistent with the production of a number of contracts without a strike—I can find no violation and therefore, would dismiss the complaint.

MEMBER LIEBMAN, dissenting.

I dissent.

It is true as the Chairman states that not all hard bargaining tactics are unlawful or indicative of bad faith. Indeed, the law contemplates that the bargaining process leaves the parties free to resort to certain economic weapons and tactics in seeking to gain acceptance of their bargaining demands. Thus, good-faith bargaining and economic weapons obviously can coexist.[1] But, the "'unique character' of particular tactics [may] be inconsistent with collective bargaining."[2] The bargaining process has certain well-established legal limitations, and "the Board has wide latitude to monitor the bargaining process."[3]

In my view, the Respondent has crossed the line from simply hard, tough bargaining to unlawful or bad-faith conduct by threatening to impose and then implementing its alternative position. While an employer is permitted to implement its last offer to the union after impasse is reached in negotiations,[4] the longstanding, plain rule is that the implemented terms and conditions of employment must reasonably be encompassed by the final pre-impasse proposal.[5] Respondent here implemented changes far more onerous and not reasonably encompassed by its final offer. I do not believe it intended bargaining about the alternative position to occur.[6] Pre-

[9] *Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 211 (1964) (citing *NLRB v. American National Insurance Co.*, 343 U.S. 395, 408. In *Fibreboard*, the Court's conclusion that a subcontracting clause was a statutory subject of collective bargaining was "reinforced by industrial practice in this country." 379 U.S. at 211. In *American National Insurance*, the Court rejected the contention that a management rights clause was per se violation of the Act, noting that "a review of typical contract clauses collected for convenience in drafting labor agreements shows that management functions clauses similar in essential detail to the clause proposed by the respondent have been included in contracts negotiated by national unions with many employers." 343 U.S. at 405. Accord: *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

[10] Contrary to Member Liebman, however, I believe that the 60-year relationship between the parties supports dismissal of a violation here because it makes it more difficult for us to infer that the Employer intended to rid itself of collective-bargaining process—a factor which supports a violation. "The unions here involved have vigorously represented the employees since 1952, and there is nothing to show that their ability to do so has been impaired by the lockout." *American Ship Building Co.*, supra at 309. Similarly, in this case, there is a longstanding relationship and a history of negotiations within the context of alternative offers.

[11] Ellen J. Dannin, *Collective Bargaining That Isn't: Implementation Becomes Popular With Employers*, The Sun (Baltimore), December 28, 1997, p. 8(F), col. 1.

[12] *American Ship Building, supra,* see also *NLRB v. Brown Food Stores,* 380 U.S. 278, 288–289 (1965), which stresses this consideration. Of course, it may be said that the permanent replacements retained by the employer make it impossible for the collective-bargaining process to flourish. But, *Curtin Matheson Scientific v. NLRB,* 494 U.S. 775 (1990), which does not permit an employer to challenge majority status on the basis of replacements alone, suggests a contrary answer. Moreover, such an inference standing alone, would appear to be inconsistent with the employer's right to retain permanent replacements under *NLRB v. MacKay Radio & Television Co.*, 304 U.S. 333 (1938). While this decision seems to me to be inconsistent with the National Labor Relations Act, it is the law of the land.

[1] *McClatchy Newspapers v. NLRB*, 131 F.3d 1026 (D.C. Cir. 1997), citing *NLRB v. Insurance Agents (Prudential Insurance Co.)*, 361 U.S. 477, 489 (1960).

[2] *NLRB v. Insurance Agents*, 361 U.S. at 488.

[3] *McClatchy Newspapers v. NLRB*, supra, citing *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404 (1982).

[4] *NLRB v. Katz*, 369 U.S. 736 (1962).

[5] *Taft Broadcasting Co*., 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

[6] The only interest the record indicates Respondent had in the alternative position was in implementing it if the final offer was not ac-

sented not as an offer to engage in bargaining, but rather as an ultimatum or as a club to force the Union to accept the terms of the final offer, it was the antithesis of bargaining and was an economic tactic which I believe unlawfully exceeds the limits of simply hard bargaining and conflicts with collective bargaining.[7]

I would deny Respondent this particular economic tactic for the sake of preserving the stability and utility of the collective-bargaining process. Implementation under the circumstances of this case goes beyond merely pressuring the Union, and might well irreparably undermine its ability to bargain. Thus, it is no response to state, as does the majority, that by attempting to club the Union into accepting its final offer, Respondent actually wished to promote agreement.[8] The means do not always justify the ends, and in this case the means exceeded the bounds and threatened the dynamics of good-faith collective bargaining.

Alfred M. Norek, Esq., for the General Counsel.
Nicholas D'Ambrosio, Esq. and *Katherine M. Sheehan, Esq. (Bond, Schoeneck & King),* for the Respondent.
Peter Mitchell, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative LawJudge. This case was tried before me in Albany, New York, on May 1, 2, and 3, 1995. The consolidated complaint here, which issued on March 31, 1995, was based on unfair labor practice charges filed by International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, Local 36FW (the Union) on October 13, 1994,[1] and February 21, 1995. The Union has been the collective-bargaining representative for certain of the employees of Telescope Casual Furniture, Inc. (Respondent) since about 1941. The allegations here relate to events that occurred during negotiations in 1994 for an agreement to replace the contract between the parties effective from September 16, 1991, to September 15, 1994. It is alleged that on about September 15, Respondent simultaneously provided the Union with a "final offer" and an "alternative position," also referred to as an "impasse position," the latter of which contained substantially different and more onerous terms than the final offer and which, by its terms, became operative upon the union membership's rejection of the final offer on September 16. It is further alleged that the Respondent implemented parts of its alternative position on about October 18 and that the alternative position contains terms relating to the wages, hours, and other terms and conditions of employment of the unit employees and is a mandatory subject for purposes of collective bargaining, and that Respondent implemented it at that time without affording the Union an opportunity to bargain with respect to this conduct and the effects of this conduct and without a valid impasse having been reached on this alternative position.

It is further alleged that a strike that was engaged in by certain of Respondent's employees commencing on about September 17 was caused or prolonged by these unfair labor practices of Respondent, the implementation of the alternative position, and that although certain of these striking employees made unconditional offers to return to work on about February 16, 1995, the Respondent has refused to reinstate them to their former positions. By this conduct Respondent is alleged to have violated Section 8(a)(1)(3)(5) of the Act.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

A. Background

The Union has represented Respondent's production employees since about 1941. The last collective-bargaining agreement between the parties ran from September 16, 1991, to September 15, and is called the Agreement. The unit described therein is all Respondent's employees, except executives, superintendents, foremen, salesmen, office and clerical help, engineers, watchmen, maintenance men, firemen, checkers and inspectors. The parties met on about 20 occasions between July 21 and mid-February 1995 to negotiate an agreement to replace the one that expired on September 15. The principal negotiators for the parties were Edward Young, assistant director of organizing for International Union of Electrical Workers (the International), Leonard Rathbun, the union president, and Cathy Foley, union secretary, for the Union, and Richard Heffern, a partner at Bond, Schoeneck & King, counsel for Respondent, Katherine Rathbun (Rathbun), Respondent's vice president for human resources, and Richard Vladyka, Respondent's vice president of production, for the Respondent.

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cepted, not in bargaining about it as an alternative set of terms on which Respondent sought agreement or impasse.

[7] At the very least, the Respondent engaged in tactics not likely to facilitate arriving at a satisfactory settlement of the dispute between the parties, or conducive to promoting a sound relationship between them once a contract was achieved. Surely, given its nearly 60-year bargaining relationship with the Union, the Respondent would have been better served by pursuing a more constructive approach to achieving an agreement, rather than resorting to threats or ultimatums.

[8] The Chairman asserts that the fact that the Respondent used an alternative position tactic in prior negotiations is "positive evidence of the employer's good faith." There is no evidence or contention, however, that the Respondent implemented its so-called "alternative proposal" in the past, as it did here. It is the implementation of the proposal, coupled with the threat to implement, without intending or offering to bargain about it, that I would find to be an unfair labor practice. Thus, the fact that the Respondent may have made alternative proposals in the past has no bearing on the conduct that is at issue in this case.

Furthermore, there is no evidence to support the Chairman's implication that it was the Respondent's use of this tactic in the past that was responsible for producing contracts between the parties without a strike. It is just as possible that the parties were able to come to an agreement in spite of the fact that the Respondent made "alternative proposals." In any event, the fact that the Union may not have chosen to contest the use of the tactic in the past by filing unfair labor practices has no bearing on this case.

[1] Unless indicated otherwise, all dates referred to herein relate to the year 1994.

Between the end of March and mid-July, Young met with the Union's negotiating committee on three or four occasions. They told Young of their concerns and he drafted language for contract proposals and they refined this language. In addition, the committee members told him that in the 1991 negotiations, the Respondent made a final proposal with a simultaneous alternative proposal; the final proposal was to be available until midnight, but if it was not accepted, the terms of the alternative proposal would take effect. They told Young that they didn't want an alternative proposal in the 1994 negotiations, and he said that he would advise the Respondent not to employ that tactic in the upcoming negotiations.

B. Negotiations

All of the negotiating sessions prior to September 16 took place in the Union's office at the plant. At the first meeting on July 21, the parties agreed to certain ground rules. Tentative agreements would not be final until agreement was reached on all the issues, and the Union requested a 2-day extension of the Agreement which expired on a weekday, so that it couldhave a weekend meeting of all its members to vote on the proposed agreement. Young testified that the parties exchanged initial proposals and they agreed that they would begin negotiations with noneconomic issues, and when agreement was reached on those issues, they would proceed to the economic issues. Some of the principal changes contained in Respondent's initial proposals were to seniority, cost of living, and overtime. It proposed to change the seniority provision from seniority as the controlling factor to add ability, skill, and efficiency, and, only if those factors were equal, would seniority rule. Under the Agreement, overtime was voluntary and those wishing to work overtime placed their names on lists.

Respondent's initial proposal made overtime mandatory. Most importantly, the initial proposal reduced the cost-of-living allowance that the employees were receiving from $6 an hour to $2.50 an hour. Young testified that at this and at subsequent sessions he told Respondent's representatives that his members were tired of giving and getting nothing back and that they would not agree to give backs, and that if Respondent expected the employees to give back what they were asking for, there would not be a contract. The parties also scheduled future negotiating sessions at this meeting. Rathbun testified in a substantially similar manner about this meeting. She testified that whereas the Union wanted to first discuss noneconomic issues before discussing the economic issues, the Respondent replied that they would agree to that approach as much as possible, but that their flexibility on noneconomic issues would depend largely upon progress on the economic issues. After the parties exchanged initial proposals, Young said that the negotiations were going to be very difficult.

The next bargaining session occurred on August 2. Young testified that he told Heffern that their proposed change in the seniority provision was an emotional issue, and Heffern told him that if the economics were right, the seniority proposals would not be in the contract. Heffern then said that at the conclusion of the negotiations there would be two offers; a final offer and an alternative offer which is meant to run the plant in case of a strike, but if everything fell into place, that would not be a problem. Young advised Heffern not to use an alternative offer because the Union considered it to be a threat, and Heffern said that he had used it in the past. Young then asked Heffern to withdraw the proposed change in the overtime proposal which would have required mandatory overtime. Rathbun said that Respondent needed more flexibility with seniority in making job assignments and transfers in order to remain competitive. Young took a "very firm position" against any change in the seniority provision, and Heffern said that if the economics fell into place, seniority would not have to be changed in the new agreement. Seniority was never discussed again at any of the subsequent bargaining sessions. Rathbun testified that at this meeting Young wanted to limit the discussions to noneconomic issues while Heffern wanted to discuss both areas. Heffern said that at the conclusion of the negotiations the Respondent was going to be formulating an alternative position to propose to the Union in the event that they were forced to operate the plant without a contract. Young said only: "I'd advise you not to do that." The parties agreed that bargaining would conclude on September 15 and the Union would have until September 16 to present the offer to the membership. She testified further that Respondent's initial proposal on seniority was the provision in the Agreement, but adding ability, skill, and efficiency, so that only if those three qualities were equal among the employees involved, would seniority control. Rathbun explained to the Union's committee that Respondent had a lot of problems with efficiency and flexibility because of the existing seniority provision, and that it needed flexibility in assigning the best employees to certain jobs, but the Union representatives stated that they were adamantly against any changes in seniority. Heffern said that Respondent's top priority was financial, and that if they were able to get economic relief, they would compromise their position on seniority. They then discussed overtime, which Rathbun testified was a "big issue" over the prior 3 years. During the prior negotiations the Union had proposed a system of lists which employees signed depending on when they were willing to work overtime. Once employees were on a list they were expected to work overtime during the designated period, absent a good excuse, and had to provide written notice to be removed from a list. This system was adopted in the Agreement, but the Respondent did not find it very effective: "It was an administrative headache," and they often could not fill jobs that needed filling. At this meeting, the Respondent proposed to stay with the lists, but if the list was exhausted, they would have the ability to assign overtime in reverse order of seniority. The Union was not happy with this proposal, but subsequently, the Respondent changed its overtime proposal in a manner that satisfied the Union, and agreement was eventually reached on the overtime issue. Heffern testified that at this meeting he said that the negotiations were crucial to the Respondent because of the difficult competitive situation that it was facing, and that they were going to ask the employees to take substantial wage cuts as well as other non economic changes, but that if the economics fell into place, then the noneconomic issues such as overtime and seniority would be withdrawn. He also said that there would be a final offer and an alternative offer, and Young simply said that he would advise him not to do that. Young did not say anything about a threat or that an alternative position would create a problem in reaching an agreement.

At the request of Ron Anderson and Lou Dudek, two representatives of the International, a meeting took place on August 26 attended by Anderson, Dudek, Rathbun, Vladyka, and Heffern. Anderson and Dudek said that they knew that the Respondent was asking for reductions and they asked what their bottom line was. Rathbun and Heffern told them that they could

not tell them exactly what their bottom line was, but they gave them a general idea of their competition and their need for cost reductions and the difficulty they were encountering with the existing seniority and overtime provisions. Anderson and Dudek said that they might have to take a strike because they were asking for a lot.

Very little was accomplished at the next meeting on August 31.[2] At this meeting, Heffern repeated that if the economic issues were agreed to they would drop their proposal on seniority and the Union gave the Respondent a counter proposal. The next meeting took place on September 1 and there was substantial discussion at this meeting on pension and overtime. Under the Agreement, Respondent paid 6.5 percent of payroll to cover its defined benefit plan. Admittedly, the pension plan, at that time, was overfunded, but there was a major disagreement about the amount of the overfunding; the Union wanted to use the overfunding to increase benefits. Young testified that pension was an important issue to the Union because the membership is an older membership with, on the average, over 20 years' seniority and over 50 years of age, but that Heffern said that pension was an economic issue that they would discuss when they complete the noneconomic issues. Heffern also said at this meeting and at subsequent meetings that he was anxious to begin discussions on the economic issues because he felt that when they were settled, many of the noneconomic issues would fall into place.

The next bargaining session occurred on September 6; the principal subject discussed was overtime. Very little was accomplished at this meeting. The parties met again the next day and again principally discussed overtime. Heffern said that he wanted to discuss the economic issues, but Young said that the International had a policy of not discussing economics with an employer looking for concessions until the Union's accountants looked through the employer's financial records. The parties met again on September 8; Heffern gave Young a summary that he had prepared on the status of bargaining on each article of the Agreement and the parties then discussed this summary. Respondent proposed changing its health plan; under the Agreement, the Respondent was paying 16.3 percent of payroll to the International for its health benefit plan. Respondent substituted the CHP Northcare Plan (CHP) and had a representative of CHP present at the meeting to answer any questions of the Union. In addition, Heffern proposed changing the pension plan to a defined contribution plan, and he told Young that Respondent was preparing a summary of how each employee would be effected by the plan, but it would not be available until the next meeting, which took place on September 13.

The Union had a membership meeting on September 12, attended by between 100 and 150 employees. Young summarized Respondent's positions on some of the more difficult issues. One of the employees, Lawrence Holcomb, asked if the Union was going to be under the threat of an alternative proposal during these negotiations as they had been in the past. Young responded that he had asked Respondent not to present an alternative proposal during these negotiations, but he was under the impression that they were going to do so anyway and that he considered it an unfair labor practice. Young then explained to the members the difference between an economic strike and an unfair labor practice strike. At the conclusion of the meeting the members gave the negotiating committee a unanimous vote of confidence.

The parties next met on September 13. The principal subject discussed was the Respondent's proposal to substitute CHP for the Union's health plan and they gave the Union some documents purporting to show that the employees would be better off with CHP. The Union objected to the fact that CHP would not cover dental or optical costs, and would eliminate coverage for retirees between the ages of 62 and 65. Rathbun testified that at this meeting they informed the Union that beginning on January 1, 1995, CHP was going to change from being solely an HMO with managed care and would provide a "point of service plan" wherein the employees could choose their own physicians. The Respondent proposed to fund CHP coverage for the employees, and those who elected to have the traditional point of service coverage, would pay for the difference. That satisfied some of the Union's objections. The Respondent then proposed to change the pension plan to a defined contribution plan with a 4-percent contribution rather than the 6.5 percent they were then contributing for the defined benefit plan. Young rejected this proposal, stating that his membership had given him a mandate to keep the existing pension plan. Rathbun testified that Heffern then asked Young if they were at impasse on that issue and Young said that they were. Heffern testified that he asked Young why he had not gotten back to him on Respondent's pension proposal and Young said: "We did get back to you. It's no." Heffern said: "It looks like we're at impasse on that" and Young said yes. Respondent again proposed a change in the overtime provision to require mandatory overtime. At the conclusion of this meeting the Union gave Respondent its first economic proposal, which included a 51-cent increase in the cost of living and a substantial, though unspecified, wage increase; the meeting concluded so that Respondent's representatives could look over the Union's proposal.

On the morning of September 14, representatives of CHP met with the union committee to answer any questions that they had. The parties then met, beginning shortly after noon time. Heffern said that he would present the Union with a final offer on the next day and that it would not contain Respondent's proposed changes in seniority. He also said that Respondent wanted to pay less to new employees than to current employees and that if the Union insisted on maintaining the defined benefit pension plan, he would have to look for further cuts elsewhere. Heffern also told the union committee that along with the final offer he would give them an alternative offer; if the Union did not accept the final offer then the alternative position would take effect so that they could operate the plant in case of a strike.

The final meeting before the contract expiration date was on September 15. Heffern began the meeting by giving Young a copy of a letter dated September 14 that Respondent gave to each of its employees. Basically, the letter states that it needs the give backs in order to reduce costs so that it can be competitive and remain in business. Young testified that the meeting began with a discussion of health insurance. Young said that if they proposed a change in health insurance, they should have done it earlier to give him adequate time to investigate the plan since the employees would be going from a traditional plan to an HMO. He asked to have until January 1, 1995, to investigate CHP and to see if the International's plan could compare, and the parties agreed to that. Heffern said that he would have a final offer for the Union later in the day. At that time, the state

[2] The annual plant shutdown took place between the meetings of August 2 and 31.

mediator appeared and the parties separated and negotiated through the mediator. It was on this day that the Union presented its second proposal on wages. As it had previously proposed, it called for an increase in the cost of living to $6.51 and to unfreeze the cost of living so that it could rise during the term of the contract, and called for a 2.5-percent increase in wages. Sometime later that day, the Union offered to reduce this proposed wage increase to 2 percent. At about 10:25 p.m. that day the Respondent gave the Union their final offer, together with a box containing about 150 copies of the alternative position. The alternative position is entitled: "Position of Telescope Casual Furniture, Inc. if final offer is rejected by Local 36 membership." Heffern said that the final offer would be good until midnight the following day and, after that, the alternative offer would be in place. Young replied that he didn't give them much to work with and that he didn't expect the offer to be accepted. He also said that as far as he was concerned, the alternative offer did not exist. He may also have said that he was only going to present the final offer to the union membership.

Rathbun testified that at the September 15 meeting, the parties agreed that the Union would have until January 1, 1995, to match the CHP Plan and that until then the existing health benefit plan would remain in effect. If there was a dispute as to the comparability of the plans, expedited arbitration would make the final determination. On that day, the Union presented its economic proposal providing for an increase in the cost of living from $6 to $6.51, unfreezing it, and providing for a 2.5-percent wage increase, which was reduced later that day to 2 percent. Respondent's final offer deleted their demands on seniority and modified their demands on overtime. Respondent also moved on its pension plan (as tied to the cost of living change); for those employees who wanted to stay with the defined benefit plan, the cost of living would be 3 percent; for those who were willing to have the defined contribution plan proposed by the Respondent, cost of living would be 3.25 percent. In addition, at that meeting the Respondent agreed to change the pay day from Friday to Thursday. There was also agreement on the terms of the proposed agreement; it would be a 3-year contract with a reopener for wages, cost of living, and pensions. At 10:25 that night, the Respondent gave the union committee its final proposal together with a box containing the alternative position; Young said that he was not interested in the alternative position.

The Union held a meeting on September 16 to discuss and vote on Respondent's final offer. The meeting began at about 4 p.m. with approximately 158 employees attending. Earlier that day, the Union had made copies of Respondent's final proposal and distributed them to the employees at the plant, so that when they arrived at the meeting, most of the employees had the final proposal. The Union had additional copies at a table for anybody who had forgotten to bring it. Also on the front table was the box containing copies of the alternative position that Respondent had given the Union on the prior evening. Young summarized the relevant portions of the final proposal and answered questions from the members; he told the members that the proposed reduction in the cost of living would cost them $120 a week and the membership reacted angrily. He also said that copies of the alternative position were on the table for anybody who wanted it, but that no action was required on the alternative proposal because it was worse than the final proposal. He then told the members that the committee recommended that the final proposal be rejected and he turned the meeting over to Leonard Rathbun for the vote. There was a motion that a secret ballot be dispensed with and that the vote be by a show of hands, and that motion passed unanimously. Leonard Rathbun then asked all those opposed to the contract to stand, and everyone in the room stood up. He then asked all those in favor of the contract to stand, and nobody stood up. Since the final proposal was rejected, the meeting was turned over to the picket captains for assignment of picket duty. Young had "generic" picket signs saying that the workers were on strike for better wages and working conditions, but he told the members that he needed some volunteers to place stickers over these signs to state that the strike was caused by Respondent's unfair labor practices, and they did so. The signs used by the Union during the strike stated: "EMPLOYEES OF TELESCOPE-STRIKE-BECAUSE OF COMPANY UNFAIR LABOR PRACTICES-LOCAL 36 IUE, AFL–CIO." Young then went to Respondent's plant and told Heffern and Respondent's owners of the vote against Respondent's final proposal. Heffern walked him to his car and told Young that he didn't think that the final offer would be approved since they were asking for a lot. Young told Heffern that the Union had room to move and they should meet to settle the dispute. Young also testified that prior to the meeting that day, the Union removed its files from its office at the plant because they were recommending that Respondent's proposal be rejected and felt that there would probably be a strike and they would not be able to get into the plant to get their files.

Ralph Hoyt, a long term employee of Respondent who went on strike on September 16, and has not yet been recalled to employment by Respondent, attended the September 16 union meeting. He testified that the floor was given to Young, who discussed the different provisions of Respondent's final proposal and there was a lot of discussion on these subjects. Young told the members that copies of Respondent's alternative position were in a box on the table if they wanted it, but it was worse than the final proposal. The standing vote was unanimous to reject the final proposal. They then put unfair labor practice signs on the picket signs and distributed them. David Morris, also a striking employee of Respondent who has not been recalled to work, testified similarly that Young explained the terms of Respondent's final proposal and said that there was an alternate proposal, which was worse than the final proposal, and would take effect at midnight if the final proposal was rejected. There was some angry reactions to the terms of the final proposal and some employees said that they would not agree to any give backs. Everybody at the meeting stood up to signify a vote against accepting the Respondent's final proposal. After the vote, they put stickers on the picket signs. Earlier that week, he and other employees removed some of their personal possessions from the plant because they anticipated that there would be a strike and that they would be unable to get into the plant to retrieve them.

Bonnie Mullen, an employee of Respondent who went on strike with the Union and returned to work on November 14, testified that a few days prior to the beginning of the strike, the union secretary and steward told her that negotiations were not going well and it appeared that there would be a strike. They told her to remove her personal items from the plant because it looked like they would not be returning. When she entered the September 16 union meeting, people were yelling, "Strike, strike." Young spoke about the provisions in Respondent's final

proposal: "He more or less said that the contract was a piece of garbage." He said that the proposal was bad, "the second one was even worse" and they didn't even want to see it. The principal reaction from the members during the meeting was that they didn't want to take a cut in their pay. The vote was unanimous to reject the proposal. She picketed at the beginning of the strike wearing a hat that said, "No more give backs." In addition, she attended some union meetings during the strike where the principal sentiment expressed by the members was that they were not going to accept a pay cut. John Hayward, who is employed by Respondent, but did not participate in the strike, testified that during the few days preceding the strike, he observed employees removing personal items from the plant. He testified that at the September 16 meeting Young said that Respondent wanted to take $3 an hour out of their pay and that the proposal was a bunch of garbage. He also said that there was another offer, but it wasn't even worth looking at. Members of the audience were yelling "strike" and "no more give backs." In addition, people were wearing T-shirts and buttons that said, "No Give Backs." Steven Shaw, an employee of Respondent who went on strike on September 16 and returned to work on December 14, testified that on September 16 he observed fellow employees packing up personal items at the plant. He attended the September 16 meeting which was presided over by Young and Leonard Rathbun. They said that the cut in the cost of living would be $2.75 an hour and they discussed pension and insurance as well. One of them said that there was not to be any more give backs. The membership vote to reject the proposal was unanimous.

On September 23, there was a less formal meeting proposed by the mediator. Young, Leonard Rathbun, and Clement attended for the Union and Heffern, Rathbun, and Vladyka attended for Respondent. Young testified that he understood the purpose of this meeting was to set dates for subsequent meetings, so he did not bring his committee with him. When they arrived, Heffern said that he wanted to make some changes in his final proposal; the cost of living would change from $2.75 to $3.25 and the Respondent would pay a certain amount to retirees living out of the area to compensate them for the replacement cost of health insurance, since CHP was a local operation. Heffern also said that he would be willing to put the final offer back on the table and would be willing to move the money around, but that they needed the same amount of cuts. Young replied that he had a mandate from his members of no give backs and that he could not negotiate because he did not have his committee with him.

The next formal negotiation occurred on September 26. Young asked what it would take to settle the strike, and Heffern said that he would be willing to move things around as long as they got the cuts they needed; he said that the final offer was still available and suggested reductions in vacations and holidays to offset the cost of living changes. Young said that the Union could not accept even half of the cuts that Respondent was asking for because it had a mandate from the membership not to accept a contract with give backs, and Heffern said that he could not settle for half of that amount either, they needed the full amount. Young testified that Heffern then asked if they were at impasse and Young agreed that they were. Heffern then said that they were at their alternative position. Heffern then noted two modifications to the alternative position; the increase from $2.75 to $3.25 in the cost of living and paying retirees a cash equivalent for health insurance coverage. Heffern asked Young if he had any questions about the alternative positions with those changes and Young said that he didn't. That was the extent of the meeting.

By letter to Young dated October 3, Heffern stated, inter alia:

> Please be advised that Telescope intends to implement part of the alternative position that took effect when Local 36 rejected Telescope's final offer on September 16, 1994. The Company intends to begin using replacements as of October 17, 1994 and will implement the following provisions for replacements or any employees who return to work:
>
> 1. The $2 per hour cost-of-living allowance for employees hired after September 16, 1994. Any striking employees who return to work will be paid a $3.25 per hour cost-of-living allowance. . .
>
> 4. Effective November 1, 1994, the medical, life and disability insurance coverage described in Appendix "1" of this letter will take effect for employees working after that date and for retirees.
>
> 5. The Company will implement the modifications to the seniority provisions as outlined in the alternative position statement of September 15, 1994.
>
> 7. The Company will implement the revised overtime provision described in its alternative position statement of September 15, 1994.
>
> If you have any questions concerning this letter, or would like to meet to discuss the Company's plan to implement the provisions described herein, please let me know.

There was a union meeting on October 9. Prior to this meeting, the Respondent sent the employees a letter dated October 5 stating, inter alia:

> Telescope's representatives met with Local 36's negotiating committee on September 26 to see if the parties could reach an agreement and end the strike. When the meeting started the Company's final offer of September 15 had expired and was no longer on the table. Instead, the Company's position was set forth in the alternative package that took the place of the final proposal once it had been rejected.
>
> During the meeting of September 26, we told the Union negotiating committee that as long as the Company could realize the cost savings that it needed we would be willing to restructure our final offer. The Union's negotiating committee once again rejected the final offer or any attempt to take other steps to provide the savings that the final offer represents. In fact, the Union negotiating committee said it would not agree to any "give backs." No further meetings have been scheduled.
>
> Telescope is committed to continuing its operations. We want to do so with our current employees and do not want to hire replacement employees. As a result, by this letter we are offering you the chance to return to work under the conditions described in the enclosed letter that was sent recently to [Young].
>
> If you do not return to work by October 17, 1994, Telescope will begin to hire replacements so that operations can be continued. The decision to return to work is up to you, and you will not be discharged or disciplined for not returning to work.

Young testified that the union meeting was "hot" and "emotional." One reason was that the work force was an older, more senior, work force and seniority was an important issue for them. The members expressed displeasure at Respondent's letter and "were unwilling to accept anything that took away their seniority, just impossible to settle the contract after that." The members voted unanimously not to return to work under the alternative proposal and gave the negotiating committee a vote of confidence.

Heffern testified that he received a telephone call from the mediator on October 12, suggesting a meeting of the parties. Heffern asked the mediator if the Union had changed its position on no give backs, and he said that he didn't know. Heffern called Young and told him of his conversation with the mediator, and asked if he had changed his position on no give backs. Young replied that he had not; in fact the membership's position had hardened as they got closer to eligibility for unemployment benefits. On about October 18, Respondent resumed production with replacement workers and some returning employees.

The next bargaining session occurred on December 8. The meeting opened with the Respondent giving the Union the names of the employees who were eligible for Christmas bonuses. Young then asked if the pensions had been frozen yet, and Heffern said that they had not, but that they intended to do so and that they were not contributing any more money. Young then asked about seniority, and Heffern said that Respondent did not intend to fire replacement workers in order to make room for the strikers. Young asked how many job openings there were, and Heffern said about fifteen to twenty in scattered classifications. Young said that he could not settle with only 15 to 20 workers returning, and the meeting ended without any other subjects discussed. The next meeting, which was requested by Young, took place on January 5, 1995, and was attended by him, Heffern and the mediator. Young told Heffern that the Union "had room to move on the economics" and that the committee had "softened" on the cost of living issue. He said that as long as the Union was assured that the pension was sound, the parties could use the pension's overfunding (which, again, the Union valued at a much higher figure than Respondent) to settle the strike. He also said that he needed all the strikers returned, but that if the Respondent would reinstate at least half of them, that might settle the matter. Heffern responded that he was a little late; if the Union had indicated a willingness to settle on that basis earlier, it might have settled at that time. However, the plant was running well and they were happy with production, but he would tell his principals of his comments. Heffern subsequently spoke to Respondent's officers, who said that they would not "sacrifice" the replacement workers in order to settle the strike.

The next meeting occurred on February 7, 1995. In addition to the usual attendees, William Bywater, international president, who had requested the meeting, Peter Mitchell, Esq., counsel for the International, and Dudek attended for the Union. Bob Vanderminden Sr., one of the principals of Respondent, attended as well. The principal subject discussed at this brief meeting was the possibility of using the pension's surplus to fund early retirement for some of the strikers which, together with reinstating some strikers, it was alleged, could settle the strike. Respondent's representatives said that they were aware that there was a surplus, but they were not sure of the amount, which their accountants were attempting to determine. They said that by the next meeting, they would notify the Union of the amount of the overfunding of the pension plan. Vanderminden then told the union representatives that he would not terminate the replacement workers in order to settle the strike.

The final meeting took place on February 16, 1995. Young testified that Heffern said that the Respondent's accountants had determined that the fund surplus was about $300,000, and that if they offered early retirement a deficit would result. Mitchell said that they did not agree with those figures; they determined the surplus to be about $1.7 million, which would be enough for early retirement and have some money left over. Vanderminden repeated his commitment to the strike replacements and said that he would not terminate them to make room for the strikers. He also said that he wanted to keep the seniority language because it was working well. He said the criteria would be ability, skill, and efficiency, and seniority would be the last factor, not the controlling factor. Vanderminden then added an additional factor—attitude, and Heffern referred to attitude on one occasion as well. Rathbun said that they would take back a "clean nosed" striker over a marginal replacement worker. Vanderminden said that there were about 20 openings, and there would soon be more when they got rid of some of the marginal replacement workers. Bywater proposed that after Respondent's summer layoff, they rehire employees on the basis of seniority. Rathbun refused to do this and said that they would be put on a preferential hiring list. Leonard Rathbun then gave Heffern a letter dated February 15, 1995 (actually, it should have been dated February 16, 1995) to Rathbun, stating:

> Local 36 of the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers hereby accepts the final offer of Telescope Casual Furniture dated September 15, 1994. As to the proposal concerning Article 13.1, cost-of-living, and Article 31, pension, Local 36 agrees to, and accepts, the continuation of the defined benefit plan. Therefore, the cost of living amount under Article 13.1 will be $3.00 per hour, for employees employed as of September 15, 1994.
>
> As to the proposal concerning Article 33.1, insurance, Local 36 accepts the Company's insurance proposal dated September 13, 1994, incorporated in its proposal of September 15, 1994.
>
> As to the proposal concerning Article 37, the Local accepts the Company's proposal for a three year agreement.
>
> This agreement and acceptance is effective immediately. On the basis of this acceptance, IUE Local 36 hereby terminates its strike against Telescope Casual Furniture and immediately and unconditionally offers to return to work.

Heffern read the letter and said that it was not unconditional because the final offer was not on the table. Although the Union disputed this, they prepared another letter which they gave Respondent:

> Given the position taken by Mr. Heffern on behalf of the Company this morning in response to the letter presented by Local 36, while we do not agree with that position with respect to the Company's final offer of September 15, 1994, the Local will pursue this matter with the National Labor Relations Board.
>
> Local 36, on behalf of the Local and all its members, unconditionally and unilaterally offers to return to work effective immediately.

On that day, the membership authorized that the strike be ended and the strike and picketing ended on that day. The parties stipulated that no strikers had been recalled to work by Respondent since February 16, 1995, and that Respondent had no new hires since that date.

Rathbun testified, like Young, that the February 16, 1995 meeting began with a disagreement over the amount of overfunding in the pension. The Union proposed taking back the strikers by seniority, and felt that it would be easier to do that after the summer shutdown, and they responded that strikers would be returned based on ability, skill, efficiency, and seniority. Rathbun said that at the conclusion of the shutdown, she would first recall those currently working, and then recall the strikers for whatever openings that she had. She referred to "cleaned nosed strikers" to differentiate them from strikers who had engaged in picket line misconduct over the prior 5 months. Vanderminden mentioned attitude, and she and Heffern "covered for him" because he is usually not involved in contract language, and said that they meant ability, skill, and efficiency. She testified that after Vanderminden mentioned attitude, Mitchell remarked that it was a regressive position and that the parties were moving further apart. Rathbun answered that they were not making a new proposal; the factors were still ability, skill, and efficiency. Heffern also testified that there was a dispute over the amount of the surplus in the pension that could be used for an early retirement plan; Respondent calculated it as about $360,000 and the Union calculated it as about $1.7 million. During the discussion of the proposed reinstatement of strikers, Vanderminden used the term "attitude" and Mitchell said that it seemed that the parties were moving further apart. Rathbun responded that they were not changing their proposal, they were still talking about the same criteria that was in their alternative position. During the meeting, Bywater said that seniority had to be a major factor in reinstatement, but by the end of the meeting Bywater said that it was the only factor. When the Union handed him the initial offer to return, he answered that it was not an unconditional offer to return because the final offer referred to therein was no longer on the table.

C. The Principal Issues Separating the Parties

The principal issues that prevented the parties from reaching an agreement herein were the proposed cuts in the cost-of-living allowance given to the employees, the pension plan, seniority, health insurance, and overtime.

Clearly, the most emotional issue here was Respondent's proposal to reduce the cost-of-living allowance. Rathbun testified that the Respondent is engaged in a highly competitive industry, with most of its competition in substantially lower wage areas of the United States as well as the Far East and Mexico, and they lost money in 9 of the prior 10 years and had to find ways to reduce their costs in order to remain competitive. During the term of the Agreement, Respondent's health insurance costs increased from 11 to 16.3 percent of payroll and the cost-of-living allowance increased to $6 an hour, while their competition became tougher. In 1992, 1993, and 1994, Respondent supplied the Union with copies of its financial statements for these years in order to support its claims of economic difficulty. As it entered the 1994 negotiations, Respondent's overall wage and benefit cost was $19.75 an hour, while its competitors comparable cost was $6 to $8, or less. Respondent's initial proposal was to reduce the cost-of-living allowance from $6 an hour to $2.75 an hour in order to be more competitive. The Union never accepted the Respondent's statements that it was losing money; Young replied that the Union had heard that plea before, and that any family owned business that could not lose money on paper should fire their accountants, and Young rejected the proposal to decrease the cost-of-living allowance, stating that they would not agree to any contract with give backs.

Young testified that by September 15, the sole remaining significant disputes were economics, and the principal economic dispute was over the proposed cut in the cost-of-living allowance. During the negotiations, the Respondent argued that it needed economic relief, referred to competitors with lower labor costs, and provided the Union with its financial statements for the prior 3 years. After reviewing these records, the Union's accountant told him that since it was a family owned business, he expected that the records would show that it lost money and, during negotiations, Young told Heffern and Rathbun that they had not convinced him that they had a problem. During the Union's membership meetings prior to, and during, negotiations, the members told him that they did not want a contract with give backs, but never said that they would not accept a contract with give backs. During negotiations, his "bargaining posture" was that he had a mandate from the membership of no give backs and that he would not agree to any give backs, and that if the Respondent expected the Union to give back what there were asking, there would not be a contract. He also said that they were losing their credibility because they cry poor in every negotiation, and eventually, people stop believing them. He said that he did not believe that the requested give backs were warranted and that the Union would not agree to a contract with give backs. Beginning in late August and September, union members began wearing shirts and buttons stating no give backs, and the union office at the plant had a sign with the words Give Backs containing a circle with a slash through it. Seniority and pensions were also emotional issues during the negotiations because the work force was an older more senior work force. Respondent proposed changes in the seniority provision because its experience under the Agreement established that it needed more flexibility in job assignments. Seniority was utilized in job bidding, overtime, layoff, and recall, and Respondent proposed to change the existing seniority provision to add skill, efficiency, and ability, and, if all those were equal, only then would seniority rule. The Union was opposed to any change in seniority, and indicated that it would not agree to any contract containing the proposed changes in seniority. During the negotiations, Heffern told the Union "that if the economic concessions fell into place we might withdraw the seniority provisions," and Respondent did withdraw these seniority provisions in its final offer. Heffern testified that the principal discussion about seniority took place at the first two bargaining sessions. Rathbun testified that there had been discussions prior to the 1994 negotiations about changing the pension plan. The parties knew that the pension was overfunded and Respondent felt that the 6.5-percent contribution was excessive, and wanted to change from a defined benefit plan to a defined contribution plan. On September 8 the Respondent made its initial proposal on pension, proposing a defined contribution plan with the pension contribution reduced from 6.5 to 4 percent. The Union refused to accept any change in the pension plan. The Respondent provided the Union with a summary for each bargaining unit employee comparing their pension benefit under a 401(k) plan as against the defined bene-

fit plan to show that, in almost every case, the employees were as well off, or better off, with their proposal, but the Union "didn't want to talk about a defined contribution plan." Rathbun testified that in its final offer: "We backed off the defined contribution plan in order to get an agreement."

Overtime was also an emotional issue which was exacerbated by a recent arbitration on the subject. The Agreement provided that overtime was voluntary and employees generally signed lists indicating what days they were willing to work overtime. Rathbun testified that Respondent's experience with this procedure was that it was clumsy and was not an efficient or effective manner of obtaining employees for overtime work and "it was an administrative headache." Respondent's initial proposal on this subject called for mandatory overtime. There was substantial discussion about this subject, and in its final proposal Respondent withdrew the proposal to make overtime work mandatory, and returned to the lists, but with job classifications added. They also changed the number of days that employees had to get on or off the lists; the Union was satisfied with this and Rathbun believes that there was agreement on this portion of the final offer.

Rathbun testified that Respondent has been part of the Union's health benefit plan for many years. During the prior negotiations, Respondent agreed not to press for any health insurance change if the Union would provide it with copies of the paid claims under the plan. She testified that the Respondent tallied these claims and they confirmed what employees had been telling her about the insurance; that considering the cost of the coverage, 16.3 percent of payroll, employees' out of pocket costs were higher than they should have been, and Respondent gave the Union the compilation that it had prepared. The Respondent proposed CHP because it could provide equal or better coverage for the employees, for about the same cost. They considered CHP a perfect fit, because Respondent is located in upstate New York, close to the Vermont border and employs both New York State and Vermont residents, and CHP resulted from a merger of CHP, a Vermont operation, with Northcare, a New York State operation. The Union complained that CHP did not provide dental or optical coverage, and Rathbun replied that the existing dental and optical coverage was minimal anyway. Another reason that Respondent proposed CHP coverage was that although, initially, the cost was a little higher, they expected that it would not rise as fast as the costs had risen under the Union's plan which rose from 11 percent in the 1988 to 1991 contract to 16.3 percent in the Agreement. Respondent arranged for a representative of CHP to be present at the September 8 meeting, and he explained how the plan worked. On September 13 Respondent modified this proposal to make it more acceptable to its employees who were not accustomed to HMOs. The Respondent agreed to pay for CHP, and any employee who wished to have the more traditional coverage could pay for the difference in cost. The Union was receptive to this idea and on September 15 the parties agreed that the Union would have until January 1, 1995, to match the CHP coverage, with an expedited arbitration, if needed, to determine the comparability. In the meantime, the Respondent would continue with the existing coverage at the cost of 16.3 percent of payroll.

Young testified that Respondent stated that they were not satisfied with the existing health plan alleging that employees were paying too much out of pocket. His initial objections to CHP were that it was an HMO, while the existing plan allowed the employees to select their own doctors and CHP did not provide dental or optical coverage. He also objected that he did not have enough time in which to compare the plans, and they agreed to continue the existing coverage until January 1, 1995, as described above.

D. Comparison of the Final Offer and the Alternative Position

As stated above, at the September 15 bargaining session, Respondent gave the Union its final proposal and, at the same time, brought in a carton containing about 150 copies of its alternative position. Young initially testified that the final offer differed from the alternative position in many respects. There was a 50-cent an hour difference in the cost-of-living allowance, and the Union had a choice in the pension tied with the cost of living in the final proposal, while in the alternative position, the Respondent had the right to implement a pension plan if they wished to do so. Additionally, the Union had until January 1, 1995, to attempt to match the CHP plan in the final proposal, while in the alternative position the Respondent could do anything that it pleased for an insurance plan. In the final proposal, seniority stayed as it had been under the Agreement, while under the alternative position, "seniority was done away with." Finally, the overtime provision in the final offer was an improvement over that provision in the Agreement; under the alternative position, overtime was mandatory.

The cost-of-living provision in the alternative position states that it will be $2.75 an hour for all employees employed by Respondent as of September 15, and $2 an hour for all those who were hired after that date. During extensive discussions on this subject during the negotiations, Respondent had originally proposed $2.50 an hour for the cost-of-living allowance. The final offer proposal was for a $3-an-hour cost of living for all employees electing to continue with the defined benefit plan, $3.25 for all employees electing to accept the defined contribution plan, and $2 an hour for all employees hired after September 15. The pension provision in the alternative position states: "Delete. Telescope reserves the right to institute a defined contribution plan." During negotiations, Respondent often stated that they felt that the 6.5-percent cost of the defined benefit plan was too high, and on about September 8 they proposed a defined contribution plan with a 4-percent cost, and alleged that the employees would be better off with this plan. In its final offer, the employees (apparently as a group) had a choice of a defined benefit plan, which would result in a $3-an-hour cost-of-living allowance, or the 4 percent defined contribution plan, which would result in a $3.25-an-hour cost of living. The insurance provision in the alternative position states: "Delete. Telescope reserves the right to offer life, disability, and health insurance benefits under an alternative plan." As stated above, Respondent initially proposed to eliminate the existing union health insurance plan, and, after extensive discussion about increasing costs and allegedly inadequate benefits, agreed that the Union would have until January 1, 1995, to establish that its insurance plan was comparable to CHP, with arbitration to decide any dispute on the subject. Young testified that the plan that Respondent notified him that it was implementing, in the attachment of its letter to him dated October 3, was the same plan that Respondent had presented to the Union at the September 8 meeting, as modified 2 weeks later as it regarded retirees.

The seniority provisions of Respondent's alternative provision provides basically that seniority shall prevail where, in the judgment of Respondent, ability, skill, and efficiency are sub-

stantially equal. This was the Respondent's initial proposal in the negotiations and throughout the bargaining prior to September 15, but it was withdrawn prior to its final proposal. During the negotiations, Rathbun said that they needed the proposed change in seniority language for job assignments and transfers in order to remain flexible and competitive. The Union strongly opposed any change in seniority, and Heffern said that if the economics fell into place, the seniority proposal would not be in its final proposal. Young also testified that there was substantial discussion of overtime during the negotiations. The Respondent's initial proposal on overtime was to give it the right to assign overtime if there were insufficient volunteers. Respondent's final offer was substantially different and, Young testified, was more favorable to the Union then the overtime provision in the Agreement in that it provided for more lists and made it easier for the employees to get off the list and to be excused from overtime work. Respondent's alternative position on overtime was essentially the same as its final proposal with two exceptions; under the alternative position there was no provision whereby employees could be excused from performing overtime work, and the Respondent could assign mandatory overtime if there were insufficient volunteers on the list. At one point during his cross examination, Young was asked by counsel for Respondent:

> Q. Is it true that in all of the areas where there are any kind of a significant difference between the alternative position and the final offer, the proposals in the alternative provision had either been initially proposed or discussed during the negotiations?
>
> A. Yes, l guess.

Rathun testified that the alternative position had a dual purpose: to induce an agreement and to give the Respondent flexibility to operate the plant in the absence of agreement. As to the former she testified:

> To show that we were willing to make compromises on issues if we could get the economic relief that we needed, but if we couldn't and we were forced to operate the plant, we had to do it at substantially different benefits.

The Respondent had employed an alternative position along with a final proposal in the negotiations in 1985, 1988, and 1991; each of those negotiations resulted in a contract without a strike. On cross examination, Young was asked:

> Q. Is it your testimony then that agreement was not reached on September 16th because of the alternative position?
>
> A. Is it my testimony that we didn't reach agreement because of the alternative position?
>
> Q. That's the question.
>
> A. No.

IV. ANALYSIS

There are two allegations here related to the alternative position proposed and implemented by the Respondent. It is first alleged that Respondent implemented this alternative position on about October 18 without affording the Union an opportunity to bargain with respect to the alternative position and the effects of it, and without a valid impasse having been reached with regard to the terms of the alternative position, in violation of Section 8(a)(1)(5) of the Act. The other allegation is that the strike that began on September 17 was caused and/or prolonged by Respondent's unfair labor practices, i.e., the proposal and implementation of the alternative position.

Although there are no major credibility determinations here, where there are differences I would credit the testimony of Rathbun and Heffern over that of Young. Although I found Young to be an articulate and fairly credible witness, it appeared to me that he was too often reluctant to make certain admissions especially during cross-examination. I did not notice any such infirmity in the testimony of Rathbun and Heffern. There is no allegation herein of overall bad-faith bargaining on the part of Respondent. Rather, it is alleged that simply by implementing the terms of its alternative proposal on about October 18, Respondent violated Section 8(a)(1)(5) of the Act. The complaint alleges that the implementation of the alternative proposal violates the Act because it was implemented without prior notice to the Union and without affording the Union an opportunity to bargain about the conduct or the effects of the conduct, and because it was implemented at a time when there was no impasse in negotiations. I reject these positions and others implicit in these arguments, and find that the implementation of the alternative position was a legitimate bargaining tactic herein, and did not violate the Act.

The bargaining here that commenced in July and continued through the expiration of the contract into February 1995 was truly hard bargaining. Rathbun credibly testified to the Respondent's needs for relief from the noncompetitive cost of the Agreement, and the need to reduce some of the costs therein. Young, Hoyt, and Morris similarly testified to the strong feeling among the employees against accepting any decrease in benefits, and this is equally understandable. However, the evidence establishes that throughout this period, Respondent engaged in good faith bargaining with a sincere attempt to reach an agreement with the Union, while, at the same time, arguing for provisions that would allow it to remain competitive in the industry. By September 15, Respondent had backed down on many of the issues that it had earlier proposed changing, such as seniority, overtime, health insurance and, to a lesser extent, pensions, provided the Union would agree to its cost-of-living allowance proposal. The Union rejected this final proposal unanimously, indicating, at that time, that it would not agree to any contract containing give backs. It appears to me that on September 16, or at least by October 18, when the alternative proposal was implemented, the parties had reached a lawful impasse.

Taft Broadcasting Co., 163 NLRB 474 at 478, enf. at *Television Artists (AFTRA) v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968) stated:

> An employer violates his duty to bargain if, when negotiations are sought or are in progress, he unilaterally institutes changes in existing terms and conditions of employment. On the other hand, after bargaining to an impasse, that is, after good faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes *that are reasonably comprehended within his pre-impasse proposals*.
>
> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to

> be considered in deciding whether an impasse in bargaining existed. [Emphasis added.]

In enforcing the Board's Order, the court stated: "As we see it, the Board's finding of impasse reflects its conclusion that there was no realistic possibility that continuation of discussion at that time would have been fruitful." In *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23, the Board stated:

> A genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position.

Larsdale, Inc., 310 NLRB 1317, 1318 (1993), states: "The Board has defined impasse as the point in time in negotiations when the parties are warranted in assuming that further bargaining would be futile." It is clear to me, that pursuant to these above described cases, there was a valid impasse herein. The principal remaining issue in contention was the proposed reduction in the cost-of-living allowance by about $3 an hour, and there was no realistic possibility that a continuation of negotiations would be fruitful; in fact, they were not. Each of the parties was engaging in good-faith bargaining, but had a serious objective that it would not relinquish. The Respondent, while giving in on many issues, was insisting on substantial economic concession in the cost-of-living allowance, while the Union's position until about February 1995 was that it would not agree to any give backs. It was clear that by September 15 and October 18 neither the Respondent nor the Union was willing to relinquish these objectives, and the parties were deadlocked on this issue. I therefore find that prior to the implementation of the alternative position on October 18, a valid impasse had existed. As the Board stated in *Taft*, once the parties have bargained to impasse, an employer may unilaterally implement changes "that are reasonably comprehended within his preimpasse proposals." The General Counsel and the Charging Party allege that Respondent could not implement the terms of the alternative position because they differed from the terms of Respondent's final proposal. I disagree. The provisions contained in the alternative position, while harsher than the terms of Respondent's final proposal, had all been proposed or discussed during the negotiations and were "reasonably comprehended" within Respondent's earlier proposals. Young's testimony on this subject is illustrative of this point. Initially, he was dismissive of the terms of the alternative position: for example, testifying that "seniority was done away with." After extensive cross-examination, he was asked:

> Q. Is it true that in all the areas where there are any kind of a significant difference between the alternative position and the final offer, the proposals in the alternative provision had either been initially proposed or discussed during the negotiations?
>
> A. Yes, l guess.

The Respondent had used alternative positions at negotiations in 1985, 1988, and 1991, each of which culminated in a contract without a strike. It was a bargaining tactic designed as an inducement to the Union to accept the more favorable final proposal. It was "hardball bargaining" and was recognized as such by the Union, but it was not unlawful, and I so find. I therefor recommend that this violation be dismissed. Counsel for the General Counsel relies on *Toyota of San Francisco*, 280 NLRB 784 (1986); I find it distinguishable. Unlike the facts in that case, in the instant matter all the provisions contained in the alternative provision had been fully discussed and understood by the parties. The administrative law judge in *Toyota of San Francisco* referred to Respondent's "ultimatum" offers as "not-fully-understood, or even discussed."

Although I have recommended that the above-described violation be dismissed, l shall also discuss the additional allegation that the Respondent's conduct caused, or prolonged the strike engaged in by the employees. l find that this allegation totally devoid of support. The law is clear that if an employer's unfair labor practices have anything to do with causing, or prolonging, a strike, that strike is an unfair labor practice strike, either from its inception, or from the commencement of the unfair labor practices. The evidence here clearly establishes that the alternative position neither caused, nor prolonged the strike, and, in fact, had no connection whatsoever to it. When Vladyka brought the carton containing the alternative position to the Union on the evening of September 15, Young said that he was not interested in it. At the union meeting the following day, he told the membership that no action was required to be taken on the alternative position because its terms were worse than the final proposal, and there is no evidence that any union representative or member took copies of the alternative position out of the carton. Rather, the evidence establishes that the strike was caused by the irreconcilable differences between the positions of the parties: the Respondent wanted the employees to accept a major cost-of-living allowance reduction, and the employees refused to do so. The Union's motto during this period and up to February 1995 was "No Give Backs" and that was the reason that the Union refused to accept Respondent's final offer and went on strike commencing September 17; there was absolutely no causal connection between that strike and Respondent's alternative position. As far as the Union was concerned, the alternative position did not exist. Therefor, even if I had found that the implementation of the alternative position violated Section 8(a)(1)(5) of the Act, I would find that it neither caused nor prolonged the strike that commenced on September 17.

CONCLUSIONS OF LAW

1. Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material, the Union has been the exclusive collective-bargaining representative of the following employees of Respondent which constitutes an appropriate unit within the meaning of Section 9(b) of the Act:

> All of Respondent's employees, excluding executives, superintendents, foremen, salesmen, office and clerical help, engineers, watchmen, maintenance men, firemen, checkers and inspectors.

4. Respondent did not violate Section 8(a)(1), (3), and (5) of the Act as was alleged in the consolidated complaint.

On these findings of facts and conclusions of law and on the entire record, I issue the following recommended[3]

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

It having been found and concluded that the Respondent has not engaged in the unfair labor practices alleged in the consolidated complaint, the consolidated complaint is dismissed in its entirety.